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No. 80-90

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NATIONAL WOOD PRESERVERS, INC., *Appellant*

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Appellee

and

TOWNSHIP OF HAVERFORD, *Intervenor*

ON APPEAL FROM
THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF APPELLANT NATIONAL WOOD PRESERVERS, INC., IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

STEPHEN R. BOLDEN, ESQUIRE
MICHAEL S. LUBLINE, ESQUIRE
ALEXANDER N. RUBIN, JR., ESQUIRE*
Counsel for Appellant, National Wood Preservers, Inc.

FELL, SPALDING, GOFF & RUBIN
1800 Penn Mutual Tower
510 Walnut Street
Phila., PA 19106
(215) 925-8300

**Counsel of Record*

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4050

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This Appeal Presents Substantial Federal Questions

Appellant, National Wood Preservers, Inc. ("Wood") believes that it has properly stated the facts of this case in its jurisdictional statement, and properly presented to this Court substantial federal questions which we believe deserve consideration by this Court. Rule 16.1(b) of the Rules of the Supreme Court of the United States per-

mits "a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on; or that the judgment rests on an adequate non-federal basis."

The Commonwealth Court apparently believed there is a substantial federal question here, since it went to great lengths (impermissibly in the view of Appellant, Wood) to "constitutionalize" Section 316 by reading into it certain requirements of fault, and straining to allocate such fault to Appellants. The Supreme Court of Pennsylvania also explicitly acknowledged the existence of a substantial federal question, and indeed, stated very clearly in its opinion that it would not entertain the issue of fault; that not being a prerequisite of the statutory provision which it construed and held to be constitutional.

The Motion of Appellee, D.E.R. appears to argue that the judgment rests on an adequate non-federal basis, thereby ignoring the fact that it is the Opinion of the Supreme Court of Pennsylvania which is appealed from and not that of the Commonwealth Court.

The Motion does not offer a single authority to support the proposition that the constitutionality of Section 316 does not present a substantial federal question, but instead seeks to prove, by reference to the record taken out of context, that Appellant, Wood, "has always been intimately associated with the creation and maintenance of the pollution condition."

At issue is Section 316 of the Clean Streams Law, which does not require fault. This case is, in fact, a test case to establish the validity of this particular statute, and not some other statute available to the D.E.R. If it wishes to pursue persons who possess the requisite degree of culpability.[1] D.E.R. has stipulated (see footnote 5

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1. See, i.e., 35 P.S. §691.307 prohibiting the unauthorized discharge of industrial wastes.

to Opinion of Pennsylvania Supreme Court at A-5) that it was proceeding against Wood, Gum, Shell and Rodgers solely under Section 316.[2] In light of this stipulation, and in light of earlier pursuit of Gum and Shell by D.E.R. — parties who were in no way responsible for *causing* the polluting condition — it is the height of sophistry for D.E.R. to submit to this Court the "counter-statement of question involved" as set forth in its Motion. D.E.R. does not now admit that Shell and Gum should not be subject to Section 316 because they are without fault, but only that their Appeals were dismissed by the Court below "on technical grounds relating to the time for filing Petitions and Cross Petitions for Allowance of Appeal under the Pennsylvania Rules of Appellate Procedure". And further, it is a certainty that if this Appeal is dismissed for lack of a substantial federal question, that the D.E.R. will not hesitate for an instant to rely on the Pennsylvania Supreme Court's pronouncements regarding the lack of culpability required by the statute.

The Factual Allegations

Rather than attempting to set forth arguments supporting one of the permissible grounds for its Motion, the D.E.R. has chosen to confuse the facts, and to show that Appellants are at fault — an issue which is clearly irrelevant here since the Supreme Court of Pennsylvania refused to consider or pass on these points. Nonetheless, we feel duty bound to clarify for the Court those factual points to which we take the greatest exception.

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2. On November 20, 1974, Dennis M. Coyne, Esquire, Trial Counsel for D.E.R., read the following stipulation into the record:

"The third stipulation is the Commonwealth has stipulated that the aforesaid Orders are based on Section 316 of the Clean Streams Law rather than on an affirmative act of discharging." (R-1879 — reproduced record in this matter.)

Issue of Corporate Succession

The D.E.R. Motion states that "National Wood itself caused the pollution problem". In footnote 3 to Appellant, Wood's jurisdictional statement (also see Stipulation Between Counsel For All Parties, R. 136, 137), it might not have been clearly stated that there exist *two* separate corporations which, at different times, bore the name "National Wood Preservers, Inc.". Where there is a complete change of ownership of a corporation, followed by a liquidation-reincorporation transaction, it is not clear under applicable state law whether the new National Wood Preservers, Inc. (operated by the Goldsteins) is automatically responsible for the past acts of the predecessor corporation (operated by Jacoby). This has neither been raised by Appellee, D.E.R., nor been determined in the Courts below, in this case, and since this question is not easily answered, it is, we suspect, the reason the Commonwealth Court conceived its "adoption theory" of liability. Whether Appellant (new National Wood) is an *actual* polluter because of the illegal acts of Jacoby when he owned the old National Wood has never been decided. Furthermore, unlike any contamination which was related to the operation of the old National Wood Preservers machinery, there is a question of whether the illegal acts of Jacoby in dumping toxic substances down a well could be attributable to his corporation when safe alternative means of disposal were available. Thus, D.E.R.'s representation of "fact" is merely an unsupported conclusion of law.

The Pollution Condition

The D.E.R. argument takes various factual twists and turns when it refers to the "pollution condition". In the context of D.E.R.'s fault argument, the pollution condition is a single condition, confined to Appellant, Wood's property, allegedly caused by National Wood dumping PCP into the groundwater. In the context of its comments regarding "unsupported allegations" that Appellant has already expended certain funds to abate the

"pollution problem", D.E.R. makes an oblique reference to a "criminal case involving pollution caused by National Wood," somehow implying (incorrectly) that National Wood, under the Goldsteins, has been convicted of an offense not disclosed in our previous Statement of Facts.

In footnote 6 to the D.E.R. Motion to Dismiss (at page 8 therein), it is implied that Appellant is still affirmatively maintaining the pollution condition because it continues to utilize "the property for its wood preserving business."

It should be reiterated that the Environmental Hearing Board found as a fact that the present Appellant, Wood, under the operation of the Goldstein family " . . . has not discharged or permitted the discharge of industrial waste into the waters of the Commonwealth" (see Adjudication of Environmental Hearing Board, dated July 31, 1976, Finding of Fact #5, A-53).

It should also be noted that the site of Jacoby's dumping activity, a certain well, is no longer under the possession or control of Appellant, Wood, this portion of the premises having been ceded back to the owner, Rodgers, for lease to Shell. The divestiture of the dumping site by Wood occurred in 1967, three years prior to the enactment of Section 316. (R-865a; see also Adjudication of EHB, July 30, 1976, Finding of Fact #7, R-143a).

The Commonwealth Court, in advancing its "adoption theory" conceptually charged National Wood under the Goldsteins with accepting responsibility for the "pollution problem" because of the $35,000 reduction in purchase price obtained in its settlement with Jacoby.

We believe that the record indicates that the pollution problems caused by Jacoby had two major facets, only one of which was fully disclosed to the Goldsteins prior to their settlement with Jacoby. First, there was the generally dirty nature of the plant and equipment itself. It was the cost of voluntarily abating this condition, that the Goldsteins addressed themselves to in their settlement, since at that time, they had no knowledge of the

true extent of Jacoby's prior dumping activities, nor of any requirement that future legislation would hold them responsible for Jacoby's past acts. It is patently unfair to hold them responsible for Jacoby's past acts involving the then unknown consequences of his dumping.

The contamination and pollution problem which currently exists is not confined to Wood's leased property and is not connected with any present activity of Wood. The pollution exists in the groundwaters under many properties which are continually being re-contaminated by the ebb and flow of groundwaters under the land. If Appellant is forced to pump out the groundwaters under its land, without a coordinated effort by surrounding landowners, it will be forced to draw additional pollutant under its own premises, and thereby to clean up pollutant under the land of others. This situation is brought about by D.E.R.'s failure to include certain landowners as the subject of its orders, and its failure to follow Pennsylvania's Rules of Appellate Procedure with respect to others.

Conclusion

For all of the foregoing reasons, Appellant, Wood respectfully requests that the Motion to Dismiss or Affirm by the Commonwealth of Pennsylvania Department of Environmental Resources be denied.

FELL, SPALDING, GOFF & RUBIN

By:_____

Stephen R. Bolden, Esquire
Michael S. Lubline, Esquire
Alexander N. Rubin, Jr., Esquire
Counsel for Appellant,
National Wood Preservers, Inc.

1800 Penn Mutual Tower
510 Walnut Street
Philadelphia, Pennsylvania 19106
215-925-8300